SE-833

GUARANTEED ENERGY, water, and wastewater CONSERVATION services PERFORMANCE CONTRACT

**AGENCY:**

**PROJECT NAME:**

**PROJECT NUMBER:**

THIS AGREEMENTis made this the       day of       in the year Two Thousand       by and between

**NAME:**      

**ADDRESS:**      

hereinafter called the “Agency”, and

**NAME:**      

**ADDRESS:**      

hereinafter called the “Energy, Water and Wastewater Conservation Service Company”.

In consideration of the mutual covenants and obligations set forth herein, the Agency and Design-Builder (hereinafter jointly referred to as the “parties”) agree to the following Terms and Conditions as they apply to the contract for the project listed above.

whereby the Contractor agrees to implement the energy, water , and wastewater conservation measures and perform the other services set forth in this Contract, including in the attached schedules:

The Contractor agrees to implement the Project and perform the Contract Services, as hereinafter defined, at the buildings owned by the Owner:

**Project Name:**      

**Project Number:**      

**Buildings:**      

**Site(s):**      

*(insert location of Buildings, e.g. campus)*

**IN WITNESS WHEREOF**, the parties have executed this Contract as of the day and year written below.

|  |  |
| --- | --- |
|  |  |
| **By:**  **(Seal)** | **By:**  **(Seal)** |
| **Signature:** | **Signature:** |
| **Title:** | **Title:** |
| **Date:**  Owner | **Date:**  Contractor |

**RECITALS**

WHEREAS the Owner is willing to have installed within the Site the equipment and related work described in Schedule A that comprises the Project;

WHEREAS the Owner desires to retain the Contractor to complete the Project and provide initial start-up, training, monitoring, verification of savings, and other services, as more fully set forth herein; and

WHEREAS the Owner desires to enter into a contract with the Contractor to achieve energy and maintenance cost reductions within the Site, subject to the terms and conditions of the Contract; and for other good and valuable consideration, the Parties, intending to be legally bound, hereby agree as follows:

**Part I - Representatives**

1. Owner’s representatives:

a. Costumer designates the individual listed below as its Senior Representative (“Owner's Senior Representative”), which individual has the responsibility for and, subject to Section 8.2 of this Contract, the authority to resolve disputes under Section 7.3 of the Contract:

**Name:**

**Title:**

**Address:**

**Telephone:**       **FAX:**

**Email:**

b. Owner designates the individual listed below as the Owner's Representative, which individual has the authority and responsibility set forth in Section 3.2 of the Contract:

**Name:**

**Title:**

**Address:**

**Telephone:**       **FAX:**

**Email:**

2. Contractor’s representatives: Pursuant to Section 5.3 of the Contract, Contractor shall designate key personnel including a Senior Representative and a Contractor’s Representative.

**part ii - Definitions**

All capitalized terms used in this Contract shall have the meaning set forth below, or in Schedule B, Section I:

1. "Change Order” means a written change in the Project executed by both Parties that, pursuant to Article 8, specifies changes in the Contract Services and, if applicable, changes in the Contract Sum and Contract Time, all of which is within the general scope or intent of the project.

2. "Concealed Conditions" means subsurface or otherwise concealed physical conditions at the Site of an unusual nature that differ materially from those conditions ordinarily found to exist and generally recognized as inherent in construction activities of the type and character as the Work, and that the Contractor could not have discovered through the exercise of reasonable diligence during the performance of the Investment Grade Audit.

3. "Confidential Information" is defined in Section 15.3.

4. " Conservation Measures" and each, an "Conservation Measure", means the equipment, devices, materials, and/or software to be installed at the Site by the Contractor and all related services as described in Schedule A.

5. "Construction Operations Phasing Plan" means a construction operation phasing plan detailing the Contractor's phasing and staging of the Work at the Site.

6. "Construction Schedule" means the Contractor's construction schedule for the Work that includes, without limitation, a schedule related to the entire Project and for each Conservation Measure, and that provides for expeditious and practicable execution of all aspects of the Work.

7. "Contract Documents”, which comprise the entire agreement, means this Contract with conditions set forth herein, the Schedules identified below, the Design & Engineering Documents (once approved by the Owner as provided in Section 4.2), the Construction Schedule, any Change Orders, the other documents listed in the Contract, and any modifications to the foregoing documents issued after execution of this Contract. The Contract Documents, which comprise the entire agreement, consist of the following:

a. Modifications and change orders to this Contract issued in accordance with Section 8;

b. This Contract along with the following Schedules which are a part of this Contract:

Schedule A: Project Description;

Schedule B: Performance Guarantee;

Schedule C: Methodology and Baseline;

Schedule D: Performance Tracking Services;

Schedule E: Payment Schedule;

Schedule F: Project Specific Owner Responsibilities; and

Schedule G: Required Maintenance;

c. Supplementary Conditions, if any, to this Contract (Supplementary Conditions);

d. Design & Engineering Documents prepared by the Contractor and Approved by the Owner in accordance with Section 4.2;

e. Owner’s Requirements as set forth in the Request for Proposals

f. Contractor’s Proposal submitted in response to Owner’s Requirements; and

g. The following other documents, if any:

Certificate of procurement authority issued by the SC Budget & Control Board

In the event of any inconsistency, conflict, or ambiguity between or among the Contract Documents, the Contract Documents shall take precedence in the order in which they are listed above.

8. Reserved

9. "Contractor's Representative" is defined in Section 5.3.

10. "Contract Services" means the Work and the Guarantee Period Services.

11. “Contract Sum” is defined in Section 2.1.

12. “Contract Time” is defined in Section 1.1.

13. Reserved

14. "Date of Commencement" means the date established pursuant to Section 1.2.

15. "Day" means calendar day unless otherwise specifically designated.

16. "Deliverables" means the Design Materials that are necessary for all construction work and/or for the Owner to operate and maintain the Project or otherwise intended for conveyance to the Owner.

17. "Design & Engineering Documents" is defined in Section 4.2.1.

18. "Design Materials" means the copies and other tangible embodiments of the drawings, specifications, designs, plans, "architectural work" (as such term is defined in the Architectural Works Copyright Protection Act of 1990) and other documents, prepared by or on behalf of the Owner, the Contractor, and/or Subcontractors in connection with the Project or the Contract Services.

19. "Final Acceptance" means the date that the Owner determines, in consultation with the Contractor, that Contractor has completed all of the required Work for constructing and commissioning the Project in accordance with the Contract Documents.

20. "Final Acceptance Date" is defined in Section 1.4.

21. "Guarantee Period" is defined in Section 1.1.

22. "Guarantee Period Services" means the performance guarantee, monitoring, Project modification, guarantee reconciliation, Performance Tracking Services, and other services to be performed during the Guarantee Period as described in Schedules B, C, and D of this Contract.

23. “Hard Operational Savings” means quantifiable and measureable labor, materials, or service contract operating expense savings that are a direct result of conservation measures implemented. Labor hours saved that would be redirected to other activities does not result in dollar savings and are not Hard Operational Savings.

24. "Hazardous Material" means (A) any substance that is listed, defined, designated, or classified under any state, federal, or local law relating to the protection of the environment or human health as a (i) hazardous material, constituent, or waste, (ii) toxic material, substance, constituent, or waste, (iii) radioactive material, substance, constituent, or waste, (iv) dangerous material, substance, constituent, or waste, (v) pollutant, (vi) contaminant, or (vii) special waste; or (B) petroleum, petroleum products, radioactive matters, polychlorinated biphenyl, pesticides, asbestos, or asbestos-containing materials.

25. "Installation Period" is defined in Section 1.1.

26. Reserved

27. "Intellectual Property Rights" means any patents, copyrights, trademarks, service marks, trade secrets and similar and related intellectual property rights protected by law.

28. "Interim Completion" means the achievement of the requirements for Substantial Completion for a particular Conservation Measure prior to the Substantial Completion Date.

29. "Investment Grade Audit" means the report prepared by the Contractor that sets forth, among other things, (a) an assessment of the energy, and water consumption characteristics of the Site, (b) specific energy, water, and wastewater analysis related to the Site and its operation, and (c) recommendations for projects or programs to achieve cost and/or energy, water, and wastewater savings in the operation of the Site.

30. "Manufacturers' Warranties" is defined in Section 4.15.

31. "Mold" means any type or form of fungus or similar biological material or agent, including mold, mildew, moisture, yeast and mushrooms, and any mycotoxins, spores, scents, or by-products produced or released by any of the foregoing.

32. “OSE” means the South Carolina Office of State Engineer.

33. "Parties" means the Contractor and the Owner. "Party" means either the Contractor or the Owner.

34. "Performance Tracking Payment" is defined in Section 2.3.

35. "Performance Tracking Services" means those services to be provided by the Contractor to measure and verify the performance of the Conservation Measures described in Schedule D.

36. "Project" means the building analysis and recommendation services, design, engineering, installation, repairs, retrofit, complete implementation of the Conservation Measures, and training program for the Owner's employees as more fully described in the “Project Description” attached hereto as Schedule A and the other terms and provisions of this Contract.

37. "Punch List" means minor adjustments, and/or corrections to the Work to be completed after Substantial Completion and prior to Final Acceptance that do not interfere with the Owner’s use and occupancy of the Conservation Measure or Project and that will not prevent the issuance of applicable permits or certificates for such use.

38. “Site” means the location of the Work as set forth on the first page of this Contract.

39. "Subcontractor" means any partnership, firm, corporation or entity other than an employee of the Contractor, who contracts with the Contractor to furnish services, labor, materials, or labor and materials at the Site. This term also includes subcontractors of any tier, consultants, suppliers, fabricators or manufacturers, whether or not in privity with the Contractor.

40. "Substantial Completion" means the date the Owner determines, in consultation with the Contractor, that the Contractor has, in accordance with the Contract Documents, sufficiently implemented the Work for the Project or a particular Conservation Measure, excluding Punch List items, so that the Owner may utilize the Project or the Conservation Measure for the use for which it is intended. Substantial Completion shall not occur until after completion of any required commissioning of systems that are a part of the Work for the Project or particular Conservation Measure. If the nature of the Work is such that the OSE must issue a certificate of occupancy before use and/or occupancy by the Owner, Substantial Completion means the date of issuance of the required certificate of occupancy.

41. "Substantial Completion Date" is defined in Section 1.3.

42. "Work" means the work and services required by the Contract Documents during the Installation Period and any period of time during which the Contractor is required to correct or replace its work and services pursuant to this Contract. The Work includes all labor, materials, equipment, and services provided or to be provided by the Contractor to fulfill the Contractor's obligations under this Contract.

### part iii – general conditions of the contract

### Article 1 – contract time and project schedule

1.1 Contract Time: The "Contract Time" is the time from the Date of Commencement, as established pursuant to Section 1.2, until the end of the Guarantee Term, as defined in Schedule B, Section I. The Contract Time consists of the Installation Period and the Guarantee Period.

a. The "Installation Period" is the period from the Date of Commencement until Final Acceptance of the entire Project.

b. The "Guarantee Period" is the period from the Savings Guarantee Commencement Date, as defined in Schedule B, Section I, until the end of the Guarantee Term.

1.2 Date of Commencement: The "Date of Commencement" shall be the date fixed in a notice to proceed issued by the Owner.

1.3 Substantial Completion: The Contractor will commence the Work within       days after the Date of Commencement and will successfully achieve Substantial Completion of the Project within       days from the Date of Commencement, subject only to adjustments of the Contract Time as provided in the Contract Documents.

1.3.1 When the Contractor believes that the entire Project or a particular Conservation Measure has achieved Interim or Substantial Completion, the Contractor will submit a certificate of Interim or Substantial Completion and a Punch List to the Owner on a form agreed to by the Parties. If the Owner concurs that the described portion of the Work as performed has achieved Interim or Substantial Completion, the Owner will accept that Work by signing the certificate of Interim or Substantial Completion and the Punch List and returning both to the Contractor. If the Owner does not concur that the Work has achieved Interim or Substantial Completion and/or that the Punch List is not complete or correct, then the Owner shall notify the Contractor within ten (10) business days of any discrepancies. To the extent the Contractor does not dispute the discrepancies raised by the Owner, the Contractor shall (i) promptly and diligently correct the Work to conform to the description of the Work set forth herein, and resubmit the certificate of Interim or Substantial Completion to the Owner, and (ii) promptly complete all items on the Punch List. If the Contractor disagrees with the discrepancies raised by the Owner, the Contractor shall notify the Owner of a dispute and such dispute shall be resolved in accordance with the provisions of Article 7 herein. If the Owner does not deliver written notice to the Contractor within ten (10) business days of receiving the certificate of Interim or Substantial Completion and the Punch List, the Owner will be deemed to have agreed to the certificate of Interim or Substantial Completion, but not the Punch List.

1.3.2 Reserved.

1.4 Final Acceptance: The Contractor will successfully achieve Final Acceptance of the entire Project within       days from the Date of Commencement, subject only to adjustments of the Contract Time as provided in the Contract Documents ("Final Acceptance Date"). The Contractor acknowledges that the Savings Guarantee Commencement Date, as defined in Schedule B, Section I, will commence on the Final Acceptance Date, even if the Contractor has failed to achieve Final Acceptance of the entire Project by that date.

1.5 Construction Schedule and Construction Operations Phasing Plan:

If the preceding box is checked, the Contractor will, within       days after the Date of Commencement prepare and submit the Construction Schedule and Construction Operations Phasing Plan, prepared in form and substance reasonably acceptable to, or as specifically prescribed by the Owner.

If the preceding box is checked, the Construction Schedule and Construction Operations Phasing Plan are included as attachments to Schedule A.

The Construction Schedule shall be updated by the Contractor and submitted to the Owner at least monthly and, if requested by the Owner, in electronic format. The Contractor shall submit a revised Construction Schedule when the Contractor's planned sequence is changed or when Project changes are made that affect the Construction Schedule. Any changes to the Construction Schedule and Construction Operations Phasing Plan are subject to review and approval by the Owner. When performing the Work, the Contractor shall comply with the Construction Operations Phasing Plan and the Construction Schedule.

### Article 2 – CoMPENSATION TO THE Contractor

2.1 Contract Sum: The Owner shall pay the Contractor for the performance of the Work as required hereunder and for the performance of all other obligations and duties imposed upon this Contractor pursuant to this Contract, other than the Performance Tracking Services, the "Contract Sum" of       and No/100 Dollars ($     ), subject to additions and deductions by Change Order as provided in this Contract.

2.2 Reserved

2.3 Compensation for Performance Tracking Services: The Contractor will perform the Performance Tracking Services set forth in Schedule D, if any, commencing upon Final Acceptance (or such other time identified in Schedule D). The Owner shall make annual payments to the Contractor for the Performance Tracking Services for each Performance Guarantee Year such services are required by Schedule D in the amounts set forth in Schedule E, Section II (the "Performance Tracking Payment"). If, any Performance Guarantee Year, the Owner fails to pay for the Performance Tracking Services in accordance with this Contract or does not permit the Contractor to perform the Performance Tracking Services, the Contractor shall have no obligation to achieve the performance guarantees set forth in Schedule B with respect to such Performance Guarantee Year.

### Article 3 – Owner

3.1 Project Specific Owner Responsibilities: The Owner agrees to undertake the Project specific Owner responsibilities set forth on Schedule F.

3.2 Owner Representative: The Owner will appoint one individual who is authorized to act on behalf of the Owner either to approve, reject, or otherwise facilitate the orderly execution of the Contract Services and with whom the Contractor may consult at all reasonable times. The Representative’s written instructions, requests, and decisions shall be binding upon the Owner as to all matters pertaining to this Contract. The Owner may substitute a new Owner's representative upon prior notice to the Contractor.

3.3 Information to the Contractor: The Owner shall furnish, with reasonable promptness, information requested by the Contractor that is necessary for the performance of the Contract Services and under the Owner’s control. Any information or documentation provided by the Owner to the Contractor relating to the Project or Site is provided only for the convenience of the Contractor. The Owner makes no representation or warranty to as to the sufficiency, completeness, or accuracy of such information.

3.4 Telephone and Network Access: The Owner is responsible for providing all required telephone lines and telephone service and/or all required network LAN/WAN access including but not limited to VPN tunneling, firewall coordination, and static/dynamic IP address maintenance to allow the Contractor 24/7 remote access to performance tracking monitoring systems to the extent required to perform and complete the Contract Services.

3.5 Utility Access and Use:

If the preceding box is checked, the Owner shall allow the Contractor to use reasonable quantities of water and electricity for construction purposes without charge as long as these utilities are available and in close proximity to the work area. Contractor shall be conscientious in controlling excessive or frivolous use of the utilities or the Owner may charge the Contractor for wasteful useage.

3.6 Sanitary Facilities:

If the preceding box is checked, the Contractor may use those sanitary facilities designated by the Owner as available for use.

If the preceding box is checked, the Contractor may not use the Owner’s sanitary facilities. The contractor shall provide sanitary facilities at the job site and maintain same in a clean and sanitary condition for the use of its employees and employees of its subcontractors for the duration of construction. The sanitary facilities shall conform to the requirements of the South Carolina Department of Health and Environmental Control.

### Article 4 – Installation period SERVICES

4.1 Permits, Approvals and Building Codes:

4.1.1Except for those permits and fees that are specified as the responsibility of the Owner under the Contract Documents, the Contractor shall secure and pay for necessary permits, approvals, assessments and charges required for the proper execution and completion of the Work.

4.1.2 In designing and constructing the Project, the Contractor shall comply with all Building Codes and Standards as adopted in the Manual for Planning and Execution of State Permanent Improvements, Part II.

4.2 Design and Engineering Documents

4.2.1 The Contractor shall prepare, for written approval by the Owner, working drawings and specifications setting forth in detail the requirements of the construction and installation of the Project in accordance with the Contract Documents ("Design & Engineering Documents"). The Design & Engineering Documents shall include all drawings, specifications, schedules, diagrams, and plans, and such content and detail as is necessary to complete properly the construction of the Project, and shall provide information customarily necessary for the use of such documents by those in the building trades. The Design & Engineering Documents shall include manufacturer’s descriptive literature including performance and characteristics data and catalog cuts and shop drawings showing in detail the interface between Conservation Measure equipment and existing equipment and the location of Conservation Measure equipment on building floor plans. Where required by law, the Design & Engineering Documents must bear the stamp or seal of architects or engineers licensed by the State of South Carolina. The Design & Engineering Documents need not be submitted to the Owner as a complete set, but may be submitted in successive packages, each of which address separate construction trades or systems applicable to the Project. Within Click here to enter text. days after submission, the Owner shall review each package of Design & Engineering Documents and either (i) approve such documents; or (ii) disapprove such documents, specifying in writing the basis for disapproval.

4.2.2 The Contractor shall submit to OSE for approval, Design & Engineering Documents for any Conservation Measure or portion of the Project subject to the permitting requirements set forth in Chapter 1 of the edition of International Building Code adopted by the OSE. Documents submitted to OSE shall comply with the requirements of Chapters 5.1 and 5.2 of the Manual for Planning and Execution of State Permanent Improvements, Part II.

4.2.3 The Contractor shall not commence the procurement or construction of any portion of the Project until the Owner and OSE, when OSE approval is required, approve the completed Design & Engineering Documents relevant to such part or portion in writing. The Contractor covenants and agrees that Design & Engineering Documents shall be accurate and free from any errors or omissions, and shall be in compliance with and accurately reflect all applicable laws. The Contractor shall promptly modify any Design & Engineering Documents that are not in accordance with laws, are inaccurate, or contain errors or omissions, at no expense to Owner.

4.2.4 The Owner and OSE, in reviewing, approving, commenting on, or evaluating any plans, drawings, specifications, or other documents, shall have no responsibility or liability for the accuracy or completeness of such documents, for any defects, deficiencies, or inadequacies therein or for any failure of such documents to comply with the requirements set forth in the Contract Documents. In no event shall any review, approval, comment, or evaluation by the Owner or OSE relieve the Contractor of any liability or responsibility under this Contract, it being understood that the Owner is at all times ultimately relying upon the Contractor's skill, knowledge, and professional training and experience in preparing any plans, drawings, specifications, or other documents.

4.3 Supervision and Performance of the Work: The Contractor shall supervise, perform, and direct the Work, using the professional skill, care, and attention reasonably required for projects similar to the Project. The Contractor shall be solely responsible for and have control over means, methods, techniques, sequences, and procedures and for coordinating all portions of the Work under the Contract, unless the Contract Documents give other specific instructions concerning these matters. The Contractor agrees to faithfully and fully perform the terms of this Contract, and shall complete the Work free and clear of all liens. The Contractor shall, at all times during the progress of the Work, employ enough skilled workers and have on hand and maintain an adequate supply of materials and equipment to complete the Work in accordance with the Construction Schedule.

4.4 The Contractor acknowledges that it has investigated and satisfied itself regarding all the conditions of the specific areas in and about the Site affected by the Work and the conditions under which it is to perform the Work. The Contractor further acknowledges that it has executed this Contract based on such investigation, study, and determination.

4.5 Employee Discipline: The Contractor shall enforce discipline and good order among the Contractor's employees and other persons carrying out the Work.

4.6 Safety: The Contractor shall comply with all federal and state work site safety requirements and shall be responsible for initiating, maintaining, and supervising reasonable safety precautions and programs in connection with the performance of the Contract Services. The Contractor shall take reasonable precautions for safety of, and shall provide reasonable and appropriate protection to prevent damage, injury or loss to (1) employees on the Work and other persons who may be affected thereby; (2) the Work and materials and equipment to be incorporated therein; and (3) other property at the Site or adjacent thereto.

4.7 Waste Materials and Rubbish: The Contractor shall keep the premises and surrounding areas free from accumulation of waste materials or rubbish caused by the Work. Upon Final Acceptance of the Project, the Contractor shall, to the Owner’s satisfaction, remove from and about the Site, all waste materials, rubbish, surplus material , and Contractor's tools, equipment, machinery.

4.8 Recycling: The Contractor shall give preference to the use of products containing recycled content in the performance of the Work. The Contractor shall cooperate with any recycling program established for the Site or available through the state or a political subdivision of the state.

4.9 Access to the Work: The Contractor shall provide the Owner with unrestricted access to the Work in preparation and progress wherever located in the Site.

4.10 Use of Site: The Contractor shall confine its operations to the portions of the Site identified in the Contract Documents or otherwise approved by the Owner, and shall not unreasonably encumber the portions of the Site used for the Work with materials, equipment, or similar items. The Contractor and all Subcontractors shall use only such entrances to the Site as are designated by the Owner. During occupied hours, Contractor shall limit construction operations to methods and procedures that do not adversely affect the environment of occupied spaces within the Site, including but not limited to creating noise, odors, air pollution, ambient discomfort, or poor lighting.

4.11 Project Meetings: The Contractor shall provide for periodic project meetings as mutually agreed upon between the parties during the Installation Period, and shall give timely advance written notice of such meetings and the agenda to the Owner. The Contractor shall record minutes and distribute copies of minutes of meetings to the Owner and the OSE within five (5) business days after each meeting. The Contractor shall schedule additional project meetings if requested by the Owner.

4.12 Correction of the Work:

4.12.1 The Owner shall have the right and authority to reject Work that does not conform to the Contract Documents. The Contractor shall promptly correct Work rejected by the Owner for failing to conform to the requirements of the Contract Documents, whether or not fabricated, installed or completed. The provisions of this Section 4.12 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

4.12.2 If the Contractor fails to correct the Work, or any portion thereof, that is not in accordance with the requirements of the Contract Documents or fails to carry out Work or provide information in accordance with the Contract Documents, the Owner may make written demand upon the Contractor to cure its defaults within seven days. Within seven days after receipt of the Owner’s demand, the Contractor shall cure its defaults unless the default is such that it is not capable of cure within seven days. If the default is such that it is not capable of cure within seven days, the Contractor shall reach an agreement with the Owner on a plan to cure its defaults within five days after receipt of the Owner’s demand. The Contractor shall commence and diligently and continuously pursue the cure of such defaults in accordance with the agreed plan. If the Contractor fails to cure its defaults as heretofore provided, the Owner may order the Contractor, in writing, to stop the Work, or any portion thereof, until the Contractor has eliminated the cause for such order or has provided the Owner with a plan for corrective action acceptable to the Owner. The right of the Owner to stop the Work shall not give rise to a duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

4.12.3 Correction after Substantial Completion: If, within one year after the date of Substantial Completion of the Work or designated portion thereof, any of the Work is found to be not in accordance with the requirements of the Contract Documents, the Contractor shall correct it promptly after receipt of written notice from the Owner to do so. The Contractor’s obligation set forth in this Section 4.12.3 is in addition to the Contractor’s obligations under Section 4.16,

4.12.4 Nothing contained in this Section 4.12 shall be construed to establish a period of limitation with respect to other obligations the Contractor has under the Contract Documents. Establishment of such time period as described in this Section 4.12 relates only to the specific obligation of the Contractor to correct the Work, and has no relationship to the time within which the obligation to comply with the Contract Documents may be sought to be enforced, nor to the time within which proceedings may be commenced to establish the Contractor's liability with respect to the Contractor's obligations other than specifically to correct the Work.

4.13 Performance and Payment Bonds: Before commencing any services hereunder, the Contractor shall provide the Owner with Performance and Payment Bonds, each in an amount not less than the Contract Price set forth in Article 2 of the Agreement. The Surety shall have, at a minimum, a ''Best Rating'' of ''A'' as stated in the most current publication of ''Best's Key Rating Guide, Property-Casualty''. In addition, the Surety shall have a minimum ''Best Financial Strength Category'' of ''Class V", and in no case less than five (5) times the contract amount. The Performance Bond shall be written on Form SE-355, ''Performance Bond'' and the Payment Bond shall written on Form SE-357, ''Labor and Material Payment Bond'', and both shall be made payable to the Owner. Owner

4.13.1 The Performance and Labor and Material Payment Bonds shall:

(a) be issued by a surety company licensed to do business in South Carolina;

(b) be accompanied by a current power of attorney and certified by the attorney-in-fact who executes the bond on the behalf of the surety company; and

(c) remain in effect for a period not less than one (1) year following the date of Substantial Completion or the time required to resolve any items of incomplete Work and the payment of any disputed amounts, whichever time period is longer.

4.13.2 Any bonds required by this Contract shall meet the requirements of the South Carolina Code of Laws and Regulations, as amended.

4.13.3 Upon the request of any person or entity appearing to be a potential beneficiary of bonds covering payment of obligations arising under the Contract, the Contractor shall promptly furnish a copy of the bonds or shall authorize a copy to be furnished.

4.14 Startup/Commissioning: The Contractor shall conduct a thorough and systematic performance test of each element and total system of the installed Conservation Measures in accordance with Schedule A, and demonstrate that all Conservation Measures comply with the requirements of the Contract Documents. The tests shall be performed by the commissioning entity designated in Schedule A, or, if no entity is designated, a qualified commissioning entity reasonably acceptable to the Owner. The Contractor shall provide advance written notice of at least ten (10) business days to the Owner of the scheduled test(s). The Owner shall have the right to designate representatives to be present at any or all such tests including representatives of the manufacturers of the Conservation Measures. The Contractor, or its Subcontractor(s), shall correct or adjust all deficiencies in operation of the Conservation Measures identified during the course of the tests described in this Section. The Contractor shall provide to the Owner a description of the ongoing training requirements for the Site's operations and maintenance personnel necessary to maintain proper Conservation Measure performance after Final Acceptance.

4.15 Manufactures' Warranties: At Final Acceptance of the Work or Interim Completion of a particular Conservation Measure, the Contractor shall furnish the Owner two (2) original complete sets of all manufacturers' warranties, guarantees, parts lists, and literature applicable to equipment, systems, fittings, and furnishings included in the Work for that Conservation Measure (collectively referred to as "***Manufacturers' Warranties***"), completed in favor of the Owner. These Manufacturers’ Warranties are in addition to and not in lieu of the Contractor's warranty set forth in Section 4.16, and the Owner is entitled to look to the Contractor for remedy in all cases where the Contractor's warranty applies regardless of whether a Manufacturer's Warranty also applies. The Owner shall acknowledge receipt of the sets of Manufacturers' Warranties on the set itself, and the Contractor shall cause six (6) copies of an acknowledged set to be made and furnished to the Owner. All Manufacturers' Warranties will be for applicable periods and contain terms not less favorable to the Owner than those terms that are standard for the applicable industries, and will either be issued in the first instance in the name of and for benefit of the Owner, or be in a freely assignable form and be assigned to the Owner without limitations.

4.16 Contractor Warranty: The Contractor warrants to the Owner that materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from faults and defects not inherent in the quality required or permitted, that the materials, equipment and Work will conform with the requirements of the Contract Documents, and that the Work will be free from any encumbrances, liens, security interests, or other defects in title upon conveyance of title to the Owner. The Contractor's warranty excludes remedy for damage or defect to the extent caused by (i) abuse by anyone other than the Contractor or those for whose acts the Contractor is responsible, (ii) modifications not approved or executed by the Contractor or Subcontractors, (iii) improper or insufficient maintenance or operation that is not in accordance with Schedule G, or (iv) normal wear and tear under normal usage. The Contractor shall furnish evidence, reasonably satisfactory to the Owner, as to the kind and quality of materials and equipment and the recommended maintenance thereto to meet the requirements of this Section.

4.17 After complete installation of the Conservation Measures but no later than the date of Substantial Completion, the Contractor shall submit operation and maintenance manuals, recommended spare parts lists, and copies of all warranties to the Owner. As-Built drawings shall be submitted no later than the Final Completion Date.

**ARTICLE 5 –** **OTHER SERVICES AND REQUIREMENTS OF Contractor**

5.1 Contract Documents: The Contractor hereby covenants and agrees that it shall duly and properly perform the Contract Services and implement the Project in accordance with the Contract Documents. Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for design and consultant services, labor, materials, tools, equipment, and machinery necessary for the proper execution and completion of the Contract Services. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Contract Services including, without limitation, all items and services that are consistent with, contemplated by, or reasonably inferable from the Contract Documents, whether or not such items and services are specifically mentioned therein. The Contract Documents are complementary, and what is required by one shall be binding as if required by all.

5.2 Subcontractors: The Contractor shall furnish in writing to the Owner for its approval the names of the Subcontractors to whom the Contractor plans to award any portion of the Contract Services. Contracts between the Contractor and Subcontractors shall require each Subcontractor, to the extent of the Contract Services to be performed by the Subcontractor, to be bound to the Contractor by the terms of the Contract Documents, and to assume toward the Owner all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner. The Contractor shall be responsible to the Owner for acts and omissions of the Subcontractors, their agents and employees, and any other persons performing portions of the Contract Services, to the same extent as the acts or omissions of the Contractor hereunder.

5.3 Contractor's Key Personnel:

5.3.1 Included within Schedule A attached hereto is a list of the Contractor's key personnel who will be responsible for supervising the performance of the Contract Services. The Contractor shall not remove any such key personnel from the Project without the Owner's prior written consent, which the Owner shall not unreasonably withhold. If, after execution of this Contract, the Owner reasonably objects to any of the Contractor's key personnel, the Contractor shall promptly remove such personnel. If any of the Contractor's key personnel are removed as provided above, any replacement personnel shall be subject to the prior written approval of the Owner, which the Owner shall not unreasonably withhold.

5.3.2 Contractor’s Representative: Contractor shall designate an authorized Representative, which individual shall have express authority to bind the Contractor with respect to all matters under this Contract. The term “Contractor” means the Contractor or the Contractor’s Representative.

5.4 Taxes: Unless otherwise provided in the Contract Documents, the Contractor shall pay all federal, state or local sales, consumer, use, and other similar taxes for which it bears the incidence of taxation that are legally enacted as of the date of execution of this Contract, whether or not effective or merely scheduled to go into effect.

5.5 Compliance with Law: The Contractor shall comply with and give all notices required by federal, state, county, and municipal laws, ordinances, regulations, and orders bearing on the performance by the Contractor of the duties or responsibilities under this Contract. The Contract Sum is based upon laws, codes, and regulations in existence as of the date this Contract is executed. Any changes in or to applicable laws, codes, and regulations affecting the cost of the Work shall entitle the Contractor to an equitable adjustment in the Contract Sum and Contract Time through a Change Order.

5.5.1 The Contractor shall promptly remedy any violation of any such law, ordinance, rule, regulation, or order that comes to its attention to the extent that the same results from its performance of the Work. The Contractor shall promptly, and in no event later than the close of the next business day following receipt, give notice to the Owner by telephone, with confirmation in writing, of receipt by the Contractor of any information relating to violations of laws, ordinances, rules, regulations, and orders.

5.6 Remedy to Damage or Loss: The Contractor shall promptly remedy damage, injury, or loss at the Site to the extent caused in whole or in part by the Contractor, a Subcontractor, or anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable.

5.7 Royalties and License Fees: The Contractor shall pay all royalties and license fees related to the Contract Services; shall defend suits or claims for infringement of patent rights required for the Contract Services to be performed; and shall hold the Owner harmless from loss on account thereof.

5.8 Publicity: Contractor shall not publish any comments or quotes by State employees, or include the State in either news releases or a published list of Owners, without the prior written approval of the Owner.

5.9 Retention and Inspection of Documents: The Contractor and its Subcontractors shall furnish the Owner with such information as the Owner reasonably requests regarding the progress and execution of the Contract Services. For three (3) years after the Contractor receives its final payment in connection with the Contract Services, the Contractor and its Subcontractors shall maintain and allow the Owner to inspect and copy records on the Contract Services showing utilization of Subcontractors, work performed, and data and information necessary to support all energy savings calculations.

5.10 Reserved

5.11 Reserved

5.12 Indemnification

5.12.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and the Owner's agents and employees from and against claims, damages, losses and expenses, including, but not limited to, attorney's fees, arising out of or resulting from performance of the Contract Services, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

5.12.2 In claims against any person or entity indemnified under Section 5.12.1 by an employee of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, the indemnification obligation under this Section 5.12 shall not be limited by a limitation on amount or type of damages, compensation or benefits payable by or for Contractor or a Subcontractor under workers' or workmen's compensation acts, disability benefit acts, or other employee benefit acts.

5.13 Insurance

5.13.1 Commercial General Liability, Business Automobile Liability, and Worker’s Compensation: The Contractor shall purchase from and maintain, in a company or companies lawfully authorized to do business in South Carolina, such insurance as will protect Contractor from claims set forth below, which may arise out of or result from Contractor’s operations under the Contract and for which the Contractor may be legally liable, whether such operations be by the Contractor or by a Subcontractor or by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable:

(a) claims under workers’ compensation, disability benefit and other similar employee benefit acts which are applicable to the Work to be performed;

(b) claims for damages because of bodily injury, occupational sickness or disease, or death of the Contractor’s employees;

(c) claims for damages because of bodily injury, sickness or disease, or death of any person other than the Contractor’s employees;

(d) claims for damages insured by usual personal injury liability coverage;

(e) claims for damages, other than to the Work itself, because of injury to or destruction of tangible property, including loss of use resulting therefrom;

(f) claims for damages because of bodily injury, death of a person or property damage arising out of ownership, maintenance or use of a motor vehicle;

(g) claims for bodily injury or property damage arising out of completed operations; and

(h) claims involving contractual liability insurance applicable to the Contractor’s obligations under Section 13.

5.13.1.1 The insurance required by Section 5.13.1 shall be written for not less than the limits of liability specified below or required by law, whichever is greater. Coverage shall be written on an occurrence basis and shall be maintained without interruption from the date of commencement of the Work until date of final payment and termination of any coverage required to be maintained after final payment and, with respect to the Contractor’s completed operations coverage, until the expiration of the period for correction of Work set forth in Section 4.12.3 or for such other period for maintenance of completed operations coverage as specified in the Contract Documents.

(a)COMMERCIAL GENERAL LIABILITY:

(1) General Aggregate (per project) $2,000,000

(2) Products/Completed Operations $2,000,000

(3) Personal and Advertising Injury $2,000,000

(4) Each Occurrence $2,000,000

(5)Fire Damage (Any one fire) $50,000

(6)Medical Expense (Any one person) $5,000

(b)BUSINESS AUTO LIABILITY (including All Owned, Non-owned, and Hired Vehicles):

(1)Combined Single Limit $1,000,000 **OR**

(2)Bodily Injury & Property Damage (each) $750,000

(c)WORKER’S COMPENSATION:

(1) State Statutory

(2)Employers Liability $100,000 Per Acc.

$500,000 Disease, Policy Limit

$100,000 Disease, Each Employee

In lieu of separate insurance policies for Commercial General Liability, Business Auto Liability, and Employers Liability, the Contractor may provide an umbrella policy meeting or exceeding all coverage requirements set forth in this Section 5.13. The umbrella policy limits shall not be less than $5,000,000.

5.13.1.2 Prior to commencement of the Work, and thereafter upon replacement of each required policy of insurance, Contractor shall provide to the Owner a written endorsement to the Contractor’s general liability insurance policy that:

(i) names the Owner as an additional insured for claims caused in whole or in part by the Contractor’s negligent acts or omissions during the Contractor’s operations;

(ii) provides that no material alteration, cancellation, non-renewal, or expiration of the coverage contained in such policy shall have effect unless all additional insureds have been given at least ten (10) days prior written notice of cancellation for non-payment of premiums and thirty (30) days prior written notice of cancellation for any other reason; and

(iii) provides that the Contractor’s liability insurance policy shall be primary, with any liability insurance of the Owner as secondary and noncontributory.

5.13.1.3 Before commencement of the Work, and thereafter upon renewal or replacement of each required policy of insurance, Contractor shall provide to the Owner a signed, original certificate of liability insurance (ACORD 25). Consistent with this Section 5.13.1, the certificate shall identify the types of insurance, state the limits of liability for each type of coverage, name the Owner Consultants as Certificate Holder, provide that the general aggregate limit applies per project, and provide that coverage is written on an occurrence basis. Both the certificates and the endorsements must be received directly from either the Contractor's insurance agent or the insurance company. An additional certificate evidencing continuation of liability coverage, including coverage for completed operations, naming the Owner as an additional insured for claims made under the Contractor’s completed operations, and otherwise meeting the above requirements, shall be submitted with the Contractor’s final request for payment for the Work and thereafter upon renewal or replacement of such coverage until the expiration of the time required by Section 5.13.1. Information concerning reduction of coverage on account of revised limits or claims paid under the General Aggregate, or both, shall be furnished by the Contractor with reasonable promptness.

5.13.1.4 A failure by the Owner either (i) to demand a certificate of insurance or written endorsement required by Section 5.13.1, or (ii) to reject a certificate or endorsement on the grounds that it fails to comply with Section 5.13.1 shall not be considered a waiver of Contractor's obligations to obtain the required insurance.

5.13.2 Contractor’s Property Insurance

**5.13.2.1 Contractor’s Installation Floater:** For projects with equipment, materials, or fixtures valued over $10,000 to be installed, in-transit, or stored off-site Contractor shall obtain, at Contractor’s expense, and keep in effect during the term of this Contract, an Installation Floater for coverage of Contractor’s labor, materials, and equipment to be used for completion of work performed under this Contract. The minimum amount of coverage to be carried shall be equal to the full amount of the Contractor’s labor, equipment, materials, or fixtures to be installed, in-transit, or stored off-site during the performance of this Contract. The policy shall include the Owner, the Contractor and its sub-contractors as their interest may appear as loss payees.

5.13.2.2 Builder’s Risk Insurance: In the event the Contractor constructs a new building, building addition, or adds a major new building system under this contract, then the Contractor shall purchase Special Form Builder’s Risk Insurance without optional deductible and with a limit equal to 100% of the replacement cost of the new building, building addition, or major new building system. The Owner and subcontractors at all tiers shall be named insured on this policy. The Contractor shall maintain such property insurance until final payment has been made or until no person or entity other than the Owner has an insurable interest in the property required by this Section 5.13.2.2 to be covered, whichever is later. Contractor’s Builder’s Risk Insurance shall:

(a) be a Special Form (“all-risk”) coverage policy and shall include, without limitation, insurance against the perils of fire (with extended coverage) and physical loss or damage including, without duplication of coverage, theft, vandalism, malicious mischief, collapse, earthquake, flood, windstorm, falsework, testing and startup, temporary buildings and debris removal including demolition occasioned by enforcement of any applicable legal requirements, and shall cover reasonable compensation for Contractor’s services and expenses required as a result of such insured loss.

(b) cover portions of the work stored off the site and in transit.

Partial occupancy or use of the new building, building addition, or building system shall not commence until the insurance company or companies providing property insurance have consented to such partial occupancy or use by endorsement or otherwise. The Owner and the Contractor shall take reasonable steps to obtain consent of the insurance company or companies and shall, without mutual written consent, take no action with respect to partial occupancy or use that would cause cancellation, lapse, or reduction of insurance.

5.13.2.3 In the event the Contractor installs and runs and/or operates (whether for testing or other purposes) heating, air conditioning, and electrical machinery and equipment, the Contractor shall purchase and maintain equipment breakdown (boiler and machinery) insurance, which shall specifically cover such objects during installation and until final acceptance by the Owner. This insurance shall include interests of the Owner, Contractor, and Subcontractors at any tier in the Work, and the Owner and Contractor shall both be named insureds.

5.13.2.4 Before an exposure to loss may occur, the Contractor shall file with the Owner a copy of each policy that includes insurance coverage required by this Section 5.13.2. Each policy shall contain all generally applicable conditions, definitions, exclusions and endorsements related to this Project. Each policy shall contain a provision that the policy will not be canceled or allowed to expire, and that its limits will not be reduced, until at least 30 days’ prior written notice has been given to the Owner.

5.13.2.5 Waiver of Subrogation: The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, for damages caused by fire or other causes of loss to the extent the property insurance provided by the Contractor pursuant to this Section 5.13.2 covers and pays for the damage, except such rights as they have to proceeds of such insurance held by the Contractor. The Owner or Contractor, as appropriate, shall require of the subcontractors, sub-subcontractors, agents and employees, each of the other, by appropriate written agreements, similar waivers each in favor of other parties enumerated herein. The policies shall provide such waivers of subrogation by endorsement or otherwise. A waiver of subrogation shall be effective as to a person or entity even though that person or entity would otherwise have a duty of indemnification, contractual or otherwise, did not pay the insurance premium directly or indirectly, and whether or not the person or entity had an insurable interest in the property damaged.

5.13.3 Owner’s Property Insurance: Upon Contractor’s substantial completion and Owners approval and acceptance of a Conservation Measure and associated systems, the Owner shall obtain through the South Carolina Insurance Reserve Fund property insurance on such Conservation Measure and associated systems. The Owner shall maintain such insurance throughout the term of the contract.

5.13.4 Contractor’s Professional Liability (Errors & Omissions) Insurance: Contractor shall procure Professional Liability Errors and Omissions Insurance with limits of not less than $2,000,000 per claim and in the aggregate. Contractor shall maintain this coverage in effect during the Installation Period of the Contract and for two (2) years after the Date of Substantial Completion of the entire Project. Contractor shall give prompt written notice to Owner of any and all claims made against this policy during the period in which this policy is required to be maintained pursuant to this Contract. Contractor agrees to require any architects and/or engineers retained by Contractor to provide design services required by the Contract (“Sub-consultants) to comply with the insurance provisions required of the Contractor pursuant to this Contract unless Contractor and Owner mutually agree to modify these requirements for Sub-consultants whose work is of relatively small scope.

5.13.4.1 Contractor shall require that Contractor's Sub-consultants indemnify and hold harmless Owner and each officer, director and employee against all claims against any of them, for personal injury or bodily injury, wrongful death or property damage arising out of negligent performance of professional services or caused by an error, omission, or negligent act of the Contractor's Sub-consultant or anyone employed by the Contractor's Sub-consultant.

5.14 Financing Contract Requirements: If one or more Financing Contracts are entered into for the Project, the Contractor agrees to provide the parties to the Financing Contract such written information, certificates, copies of invoices, receipts, lien waivers, affidavits, and other like documents as such parties may reasonably request. The Contractor hereby subordinates any liens or security interests that it may be entitled by law or under the provisions of this Contract to any lien or security interest granted in favor of the party or parties to a Financing Contract.

5.15 Software Licenses: If Contractor’s Conservation Measures, including but not limited to equipment, includes software, Contractor shall acquire for or grant to the Owner, and any contractor working for the Owner, a paid-up, perpetual, non-exclusive license to use the software. Contractor shall notify the Owner of any available upgrades to the software as soon as the Contractor becomes aware of the existence of such upgrades.

**ARTICLE 6 – LIMITATION OF LIABILITY**

6.1 Notwithstanding any other provision of the Contract Documents, but subject to a duty of good faith and fair dealing, the Contractor and Owner waive Claims against each other for listed damages arising out of or relating to this Contract. This mutual waiver includes

6.1.1 For the Owner, listed damages are (i) lost revenue and profit, (ii) losses resulting from injury to business or reputation, (iii) additional or escalated overhead and administration expenses, (iv) additional financing costs, (v) costs suffered by a third party unable to commence work, (vi) attorney's fees, (vii) any interest, except to the extent allowed by Section 15.14 (Interest), (viii) lost revenue and profit for lost use of the property, (ix) costs resulting from lost productivity or efficiency. damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

6.1.2 For the Contractor, listed damages are (i) lost revenue and profit, (ii) losses resulting from injury to business or reputation, (iii) additional or escalated overhead and administration expenses, (iv) additional financing costs, (v) attorney's fees, (vi) any interest, except to the extent allowed by Section 15.14 (Interest); (vii) unamortized equipment costs; and (viii) losses incurred by subcontractors for the types of damages the Contractor has waived as against the Owner.

6.2 This mutual waiver is applicable, without limitation, to all listed damages due to either party’s termination in accordance with Article 13. Nothing contained in this Article 6 shall be deemed to preclude an award of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents. This mutual waiver is not applicable to amounts due or obligations under Section 5.12 (Indemnification).

### Article 7 – CLAIM AND DISPUTES - DUTY OF COOPERATION, and NOTICE

7.1 Contractor and Owner are fully committed to working with each other throughout the Project to avoid or minimize claims. To further this goal, Contractor and Owner agree to communicate regularly with each other at all times notifying one another as soon as reasonably possible of any issue that if not addressed may cause loss, delay, and/or disruption of the Work. If claims do arise, Contractor and Owner each commit to resolving such claims in an amicable, professional, and expeditious manner to avoid unnecessary losses, delays, and disruptions to the Work.

7.2 In the event of a Claim against the Contractor, the Owner may, but is not obligated to, notify the surety, if any, of the nature and amount of the Claim. If the Claim relates to a possibility of the Contractor’s default, the Owner may, but is not obligated to, notify the surety and request the surety’s assistance in resolving the controversy.

7.3 In the event of a dispute, both parties shall attemptto resolve the dispute at the field level through discussions between Contractor’s Representative and Owner’s Representative. If a dispute cannot be resolved through Contractor’s Representative and Owner’s Representative, then the Contractor’s Senior Representative and the Owner’s Senior Representative, upon the request of either party, shall meet as soon as conveniently possible, but in no case later than twenty-one days after such a request is made, to attempt to resolve such dispute. Prior to any meetings between the Senior Representatives, the parties will exchange relevant information that will assist the parties in resolving their dispute. The meetings required by this Section are a condition precedent to resolution pursuant to Section 7.4.

7.4 If after meeting in accordance with the provisions of Section 7.3, the Senior Representatives determine that the dispute cannot be resolved on terms satisfactory to both the Contractor and the Owner, then either party may submit the dispute by written request to South Carolina’s Chief Procurement Officer for Construction (CPOC). Except as otherwise provided in Article 7, all claims or controversies relating to the Contract shall be resolved exclusively by the appropriate Chief Procurement Officer in accordance with Title 11, Chapter 35, Article 17 of the South Carolina Code of Laws, or in the absence of jurisdiction, only in the Court of Common Pleas for or a federal court located in, Richland County, State of South Carolina. Contractor agrees that any act by the State regarding the Contract is not a waiver of either the State’s sovereign immunity or the State’s immunity under the Eleventh Amendment of the United States Constitution.

7.5 If any party seeks resolution to a dispute by the appropriate Chief Procurement Officer pursuant to Section 7.4, the parties shall participate in non-binding mediation to resolve the claim. If the amount in controversy is $100,000.00 or less, the CPOC shall appoint a mediator, otherwise, the mediation shall be conducted by an impartial mediator selected by mutual agreement of the parties or, if the parties cannot so agree, a mediator designated by the American Arbitration Association (“AAA”) pursuant to its Construction Industry Mediation Rules. The mediation will be governed by and conducted pursuant to a mediation agreement negotiated by the parties or, if the parties cannot so agree, by procedures established by the mediator.

7.6 Without relieving any party from the other requirements of Section 7.3, either party may initiate proceedings in the appropriate forum prior to initiating or completing the procedures required by Section 7.3 if such action is necessary to preserve a claim by avoiding the application of any applicable statutory period of limitation or repose.

7.7 Contractor consents that any papers, notices, or process necessary or proper for the initiation or continuation of any claims or controversies relating to the Contract; for any court action in connection therewith; or for the entry of judgment on any award made, may be served on Contractor by certified mail (return receipt requested) addressed to Contractor at the address provided for the Contractor’s Senior Representative or by personal service or by any other manner that is permitted by law, in or outside South Carolina. Notice by certified mail is deemed duly given upon deposit in the United States mail.

7.8 Continuation of Work: Pending final resolution of any dispute under this Contract, the Contractor will proceed diligently with the performance of its duties and obligations under the Contract Documents, and the Owner will continue to make payments of undisputed amounts in accordance with the Contract Documents.

### Article 8 – Changes in the Work

8.1 Change Orders: The Owner may order, or the Contractor may request of the Owner (which request may be approved, rejected, conditioned, or delayed in the Owner’s sole and absolute discretion), changes in the Work consisting of additions, deletions, or modifications to the Work. Such changes in the Work shall be authorized only by written Change Order signed by the Owner and the Contractor (and, when required, approved by OSE), stating their agreement upon all of the following:

a.The change in the Work;

b. The amount of the adjustment, if any, in the Contract Sum; and

c. The extent of the adjustment, if any, in the Contract Time.

8.2 If a Change Order provides for an adjustment to the Contract Sum, the adjustment must be calculated in accordance with Section 8.10.

8.3 At the Owner’s request, the Contractor shall prepare a proposal to perform the work of a proposed Change Order setting forth the amount of the proposed adjustment, if any, in the Contract Sum; and the extent of the proposed adjustment, if any, in the Contract Time. Any proposed adjustment in the Contract sum shall be prepared in accordance with Section 8.2. Within fifteen days of receiving the request, the Contractor shall submit the proposal to the Owner along with all documentation required by Section 8.19.

8.4 If a Change to the Contract Sum resulting from a Change in the Work exceeds the limits of the Owner’s Construction Change Order Certification (reference certificate of procurement authority issued by the SC Budget & Control Board and made a part of this Contract), then the Owner’s agreement is not effective, and Work may not proceed, until approved in writing by the OSE.

8.5 Agreement on any Change Order shall constitute a final settlement of all matters relating to the change in the Work that is the subject of the Change Order, including, but not limited to, any adjustments to the Contract Sum or the Contract Time.

8.6 Change Directive: If the Parties do not agree on an adjustment, if any, in the Contract Sum or Contract Time, or both for the ordered changes to the Work, then the Owner may, in writing, direct Contractor to commence with such changes in the Work. The costs of such Work shall be determined in accordance with Section 8.10.

8.7 No Changes That Impact Guarantee: To the extent the Contractor reasonably determines that any change in the Work requested or directed by the Owner will materially and adversely impact the Contractor's ability to meet or sustain achievement of the performance guarantees set forth in Schedule B, the Contractor has the right, in its sole and absolute discretion, to decline such change in the Work.

8.8 Concealed or Unknown Conditions: Contractor shall immediately notify Owner if it encounters conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, prior to significantly disturbing the same. If such Concealed or Unknown Conditions cause an increase in Contractor’s cost of, or time required for, performance of any part of the Work the Contractor and Owner shall agree, by Change Order, on how to proceed and the extent of any adjustment to the time required for performance of the Work and to the Contract Sum.

8.9 Changes to Contract Sum and Contract Time. The parties may only change the Contract Sum, Substantial Completion Date, Final Acceptance Date, and time-periods set forth in Schedule B by Change Order.

8.10 Price Adjustments:

8.10.1 If any Modification, including a Change Directive, provides for an adjustment to the Contract Sum, the adjustment shall be based on whichever of the following methods is the most valid approximation of the actual cost to the contractor, with overhead and profit as allowed by Section 8.18:

a. Mutual acceptance of a lump sum;

b. Unit prices stated in the Contract Documents, except as provided in Section 8.11, or subsequently agreed upon;

c. Cost attributable to the events or situations under applicable clauses with adjustment of profits or fee, all as specified in the contract, or subsequently agreed upon by the parties, or by some other method as the parties may agree; or

d. As provided in Section 8.14.

8.10.2 Consistent with Section 8.19, costs must be properly itemized and supported by substantiating data sufficient to permit evaluation before commencement of the pertinent performance or as soon after that as practicable. All costs incurred by the Contractor must be justifiably compared with prevailing industry standards. Except as provided in Section 8.14, all adjustments to the Contract Price shall be limited to job specific costs and shall not include indirect costs, overhead, home office overhead, or profit.

8.11The parties shall equitably adjust unit prices stated in the Contract Documents or subsequently agreed upon, if a proposed Change Order or Change Directive materially changes the quantities originally contemplated such that application of such unit prices to quantities of Work proposed will cause substantial inequity to the Owner or Contractor.

8.12 Upon receipt of a Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Owner of the Contractor’s agreement or disagreement with the method, if any, provided in the Change Directive for determining the proposed adjustment in the Contract Sum and/or Contract Time.

8.13 A Change Directive signed by the Contractor indicates the Contractor’s agreement therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

8.14 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the Owner may make an initial determination, consistent with Section 8.10, of the method and the adjustment on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, an amount for overhead and profit as set forth in Section 8.18. In such case, and also under Section 8.10.1(c), the Contractor shall keep and present, in such form as the Owner may require, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Section 8.14 shall be limited to the following:

a. Costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers’ compensation insurance;

b. Costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;

c. Rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others; and

d.Costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work.

8.15 Using the percentages stated in Section 8.19, any adjustment to the Contract Sum for deleted work shall include any overhead and profit attributable to the cost for the deleted Work. .

8.16 Pending final determination of the Contract Sum adjustment, the Contractor may include its actual costs as set forth in Section 8.14, plus profit and overhead as provided in Section 8.10, along with an itemized accounting and appropriate supporting data in such form as the Owner may require, in its payment requests submitted pursuant to Article 10.

8.17 When the Owner and Contractor reach agreement upon the adjustments, such agreement shall be effective immediately and the parties shall prepare and execute a Change Order. The parties may execute a Change Order for all or any part of a Change Directive.

8.18 Agreed Overhead and Profit Rates:

For any adjustment to the Contract Sum for which overhead and profit may be recovered, other than those made pursuant to Unit Prices stated in the Contract Documents, the Contractor agrees to charge and accept, as full payment for overhead and profit, the following percentages of costs attributable to the change in the Work. The percentages cited below shall be considered to include all indirect costs including, but not limited to field and office managers, supervisors and assistants, incidental job burdens, small tools, and general overhead allocations. The allowable percentages for overhead and profit are as follows:

a. To the Contractor for work performed by the Contractor’s own forces, 17% of the Contractor’s actual costs.

b. To each Subcontractor for work performed by the Subcontractor’s own forces, 17% of the subcontractor’s actual costs.

c. To the Contractor for work performed by a subcontractor, 10% of the subcontractor’s actual costs (not including the subcontractor’s overhead and profit).

8.19 Pricing Data and Audit

8.19.1 Cost or Pricing Data:

Upon request of the Owner, Contractor shall submit cost or pricing data prior to execution of a Modification that exceeds $100,000. Contractor shall certify that, to the best of its knowledge and belief, the cost or pricing data submitted is accurate, complete, and current as of a mutually determined specified date prior to the date of pricing the Modification. Contractor’s price, including profit, shall be adjusted to exclude any significant sums by which such price was increased because Contractor furnished cost or pricing data that was inaccurate, incomplete, or not current as of the date specified by the parties. Notwithstanding any provision in this contract to the contrary, such adjustments may be made after final payment to the Contractor.

8.19.2Cost or pricing data means all facts that, as of the date specified by the parties, prudent buyers and sellers would reasonably expect to affect price negotiations significantly. Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.

8.19.3 Records Retention.

As used in Section 8.19, the term "records" means any books or records that relate to cost or pricing data that Contractor is required to submit pursuant to Section 8.19.1. Contractor shall maintain records for three years from the date of final payment, or longer if requested by the chief procurement officer. The Owner may audit Contractor’s records at reasonable times and places.

### Article 9 – Time

9.1 Time Limits: Time limits stated in the Contract Documents are of the essence of the Contract. By executing the Contract, the Contractor confirms that the Final Acceptance Date provides a reasonable period of time for performing the Work.

9.2 Delays in the Progress of the Work: If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work by the Owner, by labor disputes, fire, unusual delay in deliveries, abnormal adverse weather conditions that affect the Work not reasonably anticipatable, unavoidable casualties or any other causes which are beyond the control of the Contractor, then the Contract Time shall be extended by Change Order provided that: (i) the Contractor has notified the Owner in writing of such delay within ten (10) days following the date when the Contractor becomes aware, or should have become aware through the exercise of reasonable diligence, of such delay; (ii) the Contractor has taken all reasonable steps to avoid any such delay (including its continuance); and (iii) such delay is not a theoretical delay but does actually adversely affect the critical path of the Work. Otherwise, the Contractor shall not be entitled to an extension of the Contract Time for any delays in the progress of the Work.

### Article 10 – Payments and Completion

10.1 Payments

10.1.1 The Owner shall make payment to the Contractor for the Work performed during the Installation Period as set forth in this Article 10 and in Schedule E: Payment Schedule. The total of all payments for the Work performed during the Installation Period shall constitute the Contract Sum.

10.1.2 During the Guarantee Period, the Owner shall pay each Performance Tracking Payment due from the Owner, as set forth on Schedule E, to the Contractor within thirty days following commencement of the Performance Guarantee Year for which such Performance Tracking Payment is due.

10.2 Withholding of Payments: Payments may be withheld to the extent of, and on account of (1) defective Work not remedied, or Contract Services not in accordance with the Contract Documents; (2) claims filed by third parties; (3) failure of the Contractor to make payments promptly to the Subcontractors for labor, materials, or equipment; (4) persistent failure to carry out the Contract Services in accordance with the Contract Documents; (5) failure by the Contractor to perform its obligations under the Contract Documents; or (6) a default by the Contractor under the Contract Documents. The Owner shall promptly notify the Contractor of any reason for withholding payment.

10.3 Retainage: Subject to applicable law and subject to Title 12, Chapter 8, Section 550 of the South Carolina Code of Laws, as amended (Withholding Requirements for Payments to Non-Residents), retainage of three and one half percent (3.5%) of the total amount earned shall be withheld from partial payments to the Contractor. The Owner shall release the retainage upon Final Acceptance of the entire Project.

10.4 Payment Requests: With each payment request submitted by the Contractor during the Installation Period, the Contractor shall submit the following, all in form and substance satisfactory to the Owner:

(a) A duly executed and acknowledged Contractor's certification showing all Subcontractors with whom the Contractor has entered into subcontracts, the amount of each subcontract, the amount requested for any Subcontractor in the invoice and the amount to be paid to the Contractor, together with similar certifications from all Subcontractors;

(b) Documentation showing satisfactory completion of the Work covered by such payment request; and

(c) Such other documents and information as the Owner may reasonably request to verify satisfactory completion of the Work covered by such payment request.

10.5 Payment Due Date: The Owner shall make payment within twenty-one (21) days of submission of a payment request meeting the requirements of this Article 10 and Schedule E. If the Owner disputes any portion of a payment request, the Owner shall notify the Contractor in writing of the amount the Owner disputes and the reason for such dispute. Notwithstanding any dispute over a portion of a payment request, the Owner shall make payment of all undisputed amounts.

10.5.1 Subcontractor Payments (Chapter 6 of Title 29 of the South Carolina Code of Laws, as amended): The Contractor shall pay each Subcontractor no later than seven days after receipt of payment from the Owner the amount to which the Subcontractor is entitled, reflecting percentages actually retained from payments to the Contractor on account of the Subcontractor’s portion of the Work. By appropriate agreement with its subcontractors, the Contractor shall require each Subcontractor to make payments to Sub-subcontractors in a similar manner.

10.5.3 If the Owner does not pay the Contractor within seven days after the time established in Section 10.5 the undisputed amount of a payment request, then upon seven additional days’ written notice to the Owner, the Contractor may stop the Work until the Contractor has received payment of the undisputed amount owing. The Contract Time shall be extended appropriately and the Contract Sum shall be increased, in accordance with the provisions of Article 8, by the amount of the Contractor’s reasonable costs of shut down, delay and start-up, plus interest as provided for in the Contract Documents.

10.6 Punchlist Items: In the event that the Contractor has not completed or corrected all Punchlist items at the time of submission of its final payment request for the Work, final payment will be made by the Owner to the Contractor, less the value assigned by the Owner to the Punchlist items not yet completed or corrected and less retainage on the division(s) of work not yet completed or corrected. Owner shall make payment with respect to such final Punchlist items on an item-by-item basis within twenty-one (21) days following receipt of a Request for Payment for completed items.

10.7 Ownership of Contractor Installed Equipment:

10.7.1 Upon the Owner making payment to the Contractor pursuant to a Payment Request, all systems, equipment, materials, etc., covered by that Payment Request shall become the property of the Owner. However, any systems, equipment, materials, etc. that are not installed, fully operational, and accepted by the Owner or that are part of a Conservation Measure that is not fully installed, operational, and accepted by the Owner, shall be covered by the Contractor’s Installation Floater or Builder’s Risk Insurance as this is considered “work-in-progress.”

10.7.2 Upon final payment by the Owner to the Contractor, all rights, title, and interest in and to all improvements and equipment constructed or installed on the premises shall vest in the Owner at no additional cost, free and clear of all any liens and encumbrances created or caused by the Contractor.

### Article 11 – HAZARDOUS MATERIALS

11.1 Contractor's Responsibilities With Respect to Hazardous Materials: The scope of Work the Contractor is to perform pursuant to this Contract excludes any work or service of any nature associated or connected with the discovery, identification, abatement, cleanup, control, or removal of any currently existing Hazardous Materials or Hazardous Mold on, in, or nearby the Site beyond what is specifically defined and identified in Schedule A of this Contract. The Owner agrees that all duties and obligations in connection with any Hazardous Materials or Hazardous Mold currently located in, on or nearby the Site or brought into the Site by a party other than the Contractor or its Subcontractors, other than those defined in Schedule A, are not the Contractor’s responsibility. Should the Contractor become aware, discover or based on reasonable evidence suspect the presence of Hazardous Materials or Hazardous Mold beyond those addressed in Schedule A, the Contractor will immediately cease work in the affected area, and will promptly notify the Owner of the conditions discovered. Should the Contractor stop work because of such discovery or suspicion of Hazardous Materials or Hazardous Mold, then the Contract Time will, should the Owner elect to choose to continue the Work after remedy thereof, be reasonably extended by Change Order to cover the period required for abatement, cleanup, or removal of the Hazardous Materials or Hazardous Mold. The Contractor will not be held responsible for any claims, damages, costs, or expenses of any kind associated with such period during which work has been stopped as a result of Hazardous Materials or Hazardous Mold.

11.2 Owner's Representations and Responsibilities With Respect to Hazardous Materials: The Owner warrants and represents that to the best of the Owner's knowledge, other than as identified in Schedule A of this Contract, there are no Hazardous Materials or Mold in or on the premises that will affect, be affected by, come in contact with, or otherwise impact upon or interfere with the Work. Unless otherwise specified in Schedule A, the Owner will be responsible for taking all necessary steps to correct, abate, clean up, or control Hazardous Materials or Mold.

11.3 Hazardous Materials Introduced to the Site by Contractor: If the Contractor, its Subcontractors, and any party for whom they may be liable, introduces any Hazardous Materials to the Site then the Contractor, at its sole cost and expense, shall be responsible for any response, removal, cleanup, and/or other remedial action required by applicable law. If any Mold occurs within the Site as the result of the negligent implementation of the Project or the improper functioning of the Conservation Measures, then the Contractor, at its sole cost and expense, shall be responsible for any response, removal, cleanup, or other remedial action required by applicable law. Except as to the Contractor's initial response to an emergency, any such remedial action(s) shall require the prior review and approval of the Contractor.

### Article 12 – ownership of design materials

### 12.1 Copies Deliverables: The Deliverables are and shall remain the exclusive property of the Owner. The Contractor shall use its best efforts to ensure all copies of the Deliverables are delivered or returned to the Owner or suitably accounted for upon the Owner's request or upon final payment, whichever is earlier. The Contractor may retain one copy of the Deliverables for its records, but shall not use such copies for any purpose other than with respect to the Contract Services without the Owner's prior written consent. The Intellectual Property Rights, if any, relating to the Design Materials or the contents of or concepts embodied in the Design Materials shall remain with and belong to the Contractor or its Subcontractors, as the case may be.

12.2 License for the Use of Design Materials: The Contractor hereby grants to the Owner a perpetual, non-exclusive, irrevocable licenseto use and authorize others to use, at any time and in any manner the Contractor’s Design Materials for purposes including, but not limited to, constructing, using, maintaining, repairing,altering and adding to the building systems within the Project that are the subject of the Design Materials. The Owner shall not use such Design Materials for the construction of any other Project. The Contractor shall obtain and provide to the Owner licenses from the Contractor’s Subcontractors that have terms identical to those that obligate the Contractor to the Owner as expressed above in this **S**ection12.2.

12.3 Delivery of Deliverables and As-built Drawings: Upon the earlier of the date of Interim Completion for a particular Conservation Measure or the date of termination of this Contract, the Contractor shall deliver to the Owner any Deliverables not previously submitted to the Owner for that Conservation Measure. Upon the date of Final Acceptance of the entire Project, the Contractor must provide “as-built” drawings of all existing and modified conditions associated with the Project, conforming to typical engineering standards. The Contractor shall also submit as-built drawings to the Owner in an electronic format compatible with the AutoCAD or other similar system in use by the Owner.

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### Article 13 – DEFAULT AND Termination

13.1 Owner's Right to Cure Default: If the Contractor defaults, persistently fails or neglects to carry out the Contract Services in accordance with the Contract Documents, or fails to perform a provision of the Contract, the Owner shall provide written notice of such default, failure, or neglect to the Contractor. If the Contractor fails to cure such default, failure, or neglect within thirty (30) days from receipt of the Owner's notice, the Owner may. without prejudice to any other right or remedy the Owner may have, make good such deficiencies and may deduct the cost thereof, including compensation for the Owner's services and expenses made necessary thereby, from the payment then or thereafter due the Contractor. Additionally, in the case of an “emergency” (defined herein as any default, neglect or defect in or with respect to the Contract Services endangering life, the Owner's or a tenant's ability to occupy all or any portion of the Site, and/or property damage in excess of $10,000), the Owner shall provide the Contractor with written notice of such default, failure or neglect constituting such emergency, but the Owner may immediately commence and continue correction of such emergency, without waiting for the expiration of the above-described notice and cure period. In any case where the Owner makes good any deficiencies as provided herein, an appropriate Change Order shall be issued deducting from payments then or thereafter due the Contractor all reasonable and necessary costs incurred by the Owner for the correction of such deficiencies. If payments then or thereafter due the Contractor are not sufficient to cover such amounts, the Contractor shall pay the difference to the Owner upon demand.

13.2 Termination Upon Default: Alternatively, at the Owner's option, if the Contractor has not cured such default or failure within thirty (30) days from receipt of the Owner's notice, Owner may terminate the Contract and take possession of the area at the Site affected by the Work and remove all materials, equipment, tools and construction equipment and machinery thereon owned by the Contractor (or require the Contractor to immediately remove all such materials, equipment, tools and construction equipment and machinery from the Site) and the Owner may finish (or cause another contractor to finish) the Work by whatever method the Owner may deem expedient. After termination by the Owner pursuant to this Section 13.2, the Contractor shall not be entitled to any further payment under this Contract, except to the extent of any amount by which the value of the Work completed prior to such termination and not previously paid for by the Owner exceeds the amount due by the Contractor to the Owner under this Section (including all damages that the Owner would be entitled to recover at law from the Contractor by reason of the Contractor’s breach), and even then only at such time as the Work is finally completed by the Owner. If the unpaid balance of the Contract Sum exceeds the cost of finishing the Work, including compensation for any consultant’s or architect's services and expenses made necessary thereby (including, without limitation, the Owner's reasonable attorney's fees and costs), such excess shall be paid to the Contractor following completion of the Work by the Owner, but if such cost exceeds such unpaid balance, the Contractor shall pay the difference to the Owner. The Owner shall not be responsible to the Contractor for any loss of anticipated profits on Work not performed on account of a termination under this Section.

13.3 Termination For Convenience: The Owner reserves the right, for its convenience, to terminate all or any portion of the Contract Services or to terminate this Contract by ten (10) days written notice stating the effective date of the termination. In that case, the Contractor and its Subcontractors shall (except for services necessary for the orderly termination of the Contract Services):

a. stop all Contract Services so terminated;

b. place no further order or subcontracts for materials, services, equipment, or supplies on the terminated Contract Services;

c. assign to the Owner (in the manner and to the extent directed) all of the rights of the subcontracts relating to the terminated Contract Services;

d. take any action necessary to protect property of the Owner and property in the Contractor's possession in which the Owner has, or may acquire, an interest; and

e. take any other action toward termination of the Contract Services that the Owner may direct.

Thereafter, the Owner shall pay the Contractor for the terminated Contract Services, subject to the limitations set forth herein, the proportion of the Contract Sum or payment for Performance Tracking Services that the terminated Contract Services actually performed (including materials delivered to the Site) at the date of termination bears to the Contract Services required to be performed for such portion of the Contract Services. No payments shall be made for Contract Services not actually performed, and no payment shall be made or due for lost profits for portions of the Contract Services not actually performed.

13.4 Contractor Termination: Subject to the Owner's right to withhold payments pursuant to Section 10.2, if the Owner fails to make payments to the Contractor as set forth in Article 10 and Schedule E: Payment Schedule, the Contractor may, upon thirty (30) days' prior written notice to the Owner, terminate the Contract and recover from the Owner payment for all Contract Services executed and for proven loss with respect to materials, equipment, tools, and machinery, including reasonable overhead, profit and damages applicable to the Project for the Contract Services performed through the date thereof.

13.5 Funds Not Available: The State's obligation under this contract is contingent upon the availability of funds from which payment for contract purposes can be made. Pursuant to SC Code Ann § 11-35-2030(3), when funds are not appropriated or otherwise made available to support continuation of performance in a subsequent fiscal period, the contract must be canceled. Any such cancellation shall be considered a termination for the convenience.

**ARTICLE 14 - ASSIGNMENT**

14.1 The Owner and Contractor respectively bind themselves, their partners, successors, assigns, and legal representatives to covenants, agreements and obligations contained in this Contract. Neither party to the Contract shall assign the Contract as a whole, or in part, without written consent of the other and then only in accordance with and as permitted by Regulation 19-445.2180 of the South Carolina Code of Regulations, as amended. If either party attempts to make such an assignment without such consent, that party shall nevertheless remain legally responsible for all obligations under the Contract.

**Article 15 – Other Conditions or Provisions**

15.1 Representations and Warranties: Each Party warrants and represents to the other that:

(a) It has all requisite power, authority, licenses, permits, and franchises, corporate or otherwise, to execute and deliver this Contract and perform its obligations hereunder;

(b) Its execution, delivery, and performance of this Contract have been duly authorized by, or are in accordance with, its governing documents, and this Contract has been duly executed and delivered for it by the signatories so authorized, and it constitutes its legal, valid, and binding obligation;

(c) Its execution, delivery, and performance of this Contract will not result in a breach or violation of, or constitute a default under, any agreement, lease or instrument to which it is a party, or by which it or its properties may be bound or affected; and

(d) It has not received any notice, nor to the best of its knowledge is there pending or threatened any notice, of any violation of any applicable laws, ordinances, regulations, rules, decrees, awards, permits, or orders that would materially and adversely affect its ability to perform hereunder.

15.2 Cooperation: Each Party will cooperate with and assist the other Party, its advisors, consultants, attorneys, employees, agents, and representatives, at all times during the Contract Time so as to complete the Contract Services in an efficient, timely, and economical manner. Such cooperation and assistance by the Contractor shall include, without limitation, any cooperation or assistance required in connection with the Owner's efforts to obtain financing for the Project.

15.3 Confidential Information

15.3.1 The term "Confidential Information" means any documentation or information defined as either (a) a trade secret as defined in SC Code Annotated Section 30-4-40(a)(1), or (b) privileged & confidential, as that phrase is used in Section 11-35-410.

15.3.2 For every document Contractor submits to Owner, Contractor must separately mark with the word "CONFIDENTIAL" every page, or portion thereof, that Contractor contends contains information that is exempt from public disclosure because it is either (a) a trade secret as defined in Section 30-4-40(a)(1), or (b) privileged & confidential, as that phrase is used in Section 11-35-410. For every document Contractor submits to Owner, Contractor must separately mark with the words "TRADE SECRET" every page, or portion thereof, that Contractor contends contains a trade secret as that term is defined by Section 39-8-20 of the Trade Secrets Act. For every document Contractor submits to Owner, Contractor must separately mark with the word "PROTECTED" every page, or portion thereof, that Contractor contends is protected by Section 11-35-1810. All markings must be conspicuous; use color, bold, underlining, or some other method in order to conspicuously distinguish the mark from the other text. If only portions of a page are subject to some protection, do not mark the entire page. Contractor (1) agrees to the public disclosure of every page of every document submitted to the Owner, unless the page is conspicuously marked "TRADE SECRET" or "CONFIDENTIAL" or "PROTECTED" and (2) agrees that any information not marked, as required by this Section 15.3.2, as a "Trade Secret" is not a trade secret as defined by the Trade Secrets Act. In determining whether to release documents, the State will detrimentally rely on Offeror’s marking of documents, as required by this Section 15.3.2, as being either "Confidential" or "Trade Secret" or "PROTECTED". Contractor agrees to defend, indemnify & hold harmless the State of South Carolina, its officers & employees, from every claim, demand, loss, expense, cost, damage or injury, including attorney’s fees, arising out of or resulting from the State withholding information that Contractor improperly marked as "confidential" or "trade secret" or "PROTECTED".

15.4 Amendments: No amendment to this Contract shall be effective until and unless reduced to writing and executed by the Parties.

15.5 Governing Law: This Contract shall be governed by the laws of South Carolina.

15.6 Severability: If any provision of this Contract shall be held to be invalid, illegal, or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired thereby.

15.7 No Waiver: No course of dealing or failure of the Owner and/or the Contractor to enforce strictly any term, right or condition of this Contract shall be construed as a waiver of such term, right or condition. No express waiver of any term, right, or condition of this Contract shall operate as a waiver of any other term, right, or condition.

15.8 Entire Agreement: This Contract represents the entire agreement between the Owner and the Contractor with respect to the subject matter hereof, and supersedes all prior negotiations, representations, or agreements, whether written or oral.

15.9 Rights Cumulative: Except as otherwise provided in this Contract, (i) rights and remedies available to the Owner and/or the Contractor as set forth in this Contract shall be cumulative with and in addition to, and not in limitation of, any other rights or remedies available to the Parties at law and/or in equity, and (ii) any specific right or remedy conferred upon or reserved to the Owner and/or the Contractor in any provision of this Contract shall not preclude the concurrent or consecutive exercise of a right or remedy provided for in any other provision hereof.

15.10 Further Assurances: Each Party hereto shall, from time to time, at the request of the other Party and without further consideration, execute and deliver and cause to be executed and delivered such other instruments and take such other actions as the requesting Party may reasonably request to undertake the Contract Services and carry out the intent and purposes of this Contract.

15.12 Notices: Any information or notices required to be given under this Contract shall be in writing and shall be delivered either by (i) certified mail, return receipt requested, in which case notice shall be deemed delivered three (3) business days after deposit, postage prepaid, in the U.S. mail; (ii) a reputable messenger service or a nationally recognized overnight courier, in which case notice shall be deemed delivered one (1) business day after deposit with such messenger or courier; or (iii) personal delivery with receipt acknowledged in writing, in which case notice shall be deemed delivered when received. All notices shall be addressed as follows:

If to Owner:

If to Contractor:

The foregoing addresses may be changed from time to time by notice to the other Party in the manner herein before provided for.

15.14 Interest: Payments due to the Contractor and unpaid under the Contract Documents shall bear interest only if and to the extent allowed by Title 29, Chapter 6, Article 1 of the South Carolina Code of Laws. Amounts due to the Owner shall bear interest at the rate of one percent a month or a pro rata fraction thereof on the unpaid balance as may be due.

15.15Economic Conflict of Interest: A contractor shall not have or exercise any official responsibility regarding a public contract in which the contractor, or a business with which he is associated, has an economic interest. A person working for contractor shall not have or exercise any official responsibility regarding a public contract in which the person, an individual with whom he is associated, or his family members have an economic interest. If contractor is asked by any person to violate, or does violate, either of these restrictions, contractor shall immediately communicate such information to the procurement officer. The state may rescind, and recover any amount expended as a result of, any action taken or contract entered in violation of this provision. The terms " business with which he is associated," "economic interest," "family member," "immediate family," "individual with whom he is associated," "official responsibility" and "person" have the meanings provided in Section 8-13-100.

15.16Illegal Immigration: Contractor certifies and agrees that it will comply with the applicable requirements of Title 8, Chapter 14 of the South Carolina Code of Laws and agrees to provide to the State upon request any documentation required to establish either: (a) that Title 8, Chapter 14 is inapplicable both to Contractor and its subcontractors or sub-subcontractors; or (b) that Contractor and its subcontractors or sub-subcontractors are in compliance with Title 8, Chapter 14. Pursuant to Section 8-14-60, "A person who knowingly makes or files any false, fictitious, or fraudulent document, statement, or report pursuant to this chapter is guilty of a felony, and, upon conviction, must be fined within the discretion of the court or imprisoned for not more than five years, or both." Contractor agrees to include in any contracts with its subcontractors language requiring its subcontractors to (a) comply with the applicable requirements of Title 8, Chapter 14, and (b) include in their contracts with the sub-subcontractors language requiring the sub-subcontractors to comply with the applicable requirements of Title 8, Chapter 14. (An overview is available at [www.procurement.sc.gov](http://www.procurement.sc.gov))

15.17 Drug-Free Workplace: The Contractor certifies to the Owner that Contractor will provide a Drug-Free Workplace, as required by Title 44, Chapter 107 of the South Carolina Code of Laws, as amended.

15.18False Claims: According to the S.C. Code of Laws § 16-13-240, "a person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat and defraud a person of that property is guilty" of a crime.

15.19Non-Indemnification: Any term or condition is void to the extent it requires the State to indemnify anyone. It is unlawful for a person charged with disbursements of state funds appropriated by the General Assembly to exceed the amounts and purposes stated in the appropriations. (§ 11-9-20) It is unlawful for an authorized public officer to enter into a contract for a purpose in which the sum is in excess of the amount appropriated for that purpose. It is unlawful for an authorized public officer to divert or appropriate the funds arising from any tax levied and collected for any one fiscal year to the payment of an indebtedness contracted or incurred for a previous year. (§ 11-1-40)

15.20 Minority Business Enterprises: Contractor shall notify Owner of each Minority Business Enterprise (MBE) providing labor, materials, equipment, or supplies to the Project under a contract with the Contractor. Contractor’s notification shall be via the first monthly status report submitted to the Owner after execution of the contract with the MBE. For each such MBE, the Contractor shall provide the MBE’s name, address, and telephone number, the nature of the work to be performed or materials or equipment to be supplied by the MBE, whether the MBE is certified by the South Carolina Office of Small and Minority Business Assistance, and the value of the contract.

15.22 Interpretation of Building Codes: As required by Title 10, Chapter 1, Section 180 of the South Caroline Code of Laws, as amended, OSE shall determine the enforcement and interpretation of all building codes and referenced standards on state buildings. The Contractor shall refer any questions, comments, or directives from local officials to the Owner and OSE for resolution.

15.23 Intellectual Property Indemnity: Without limitation and notwithstanding any other provision in this agreement, Contractor shall, upon receipt of notification, defend and indemnify the Indemnitees against all actions, proceedings or claims of any nature (and for all damages, settlement payments, attorneys' fees, costs, expenses, losses or liabilities attributable thereto) by any third party asserting or involving Intellectual Property (IP) rights related to the Instruments of Service. Contractor's obligations under this paragraph do not apply to a claim to the extent (i) that the claim is caused by Contractor's compliance with a detailed, exact statement of particulars (such as a statement prescribing materials, dimensions, and quality of work) furnished by the State unless Contractor knew its compliance with the State's specifications would infringe an IP right, or (ii) that the claim is caused by Contractor's compliance with a detailed, exact statement of particulars furnished by the State if the State knowingly relied on a third party's IP right to develop the specifications provided to Contractor and failed to identify such product to Contractor. State must reasonably cooperate with Contractor's defense of such claims or suits and, subject to Title 1, Chapter 7 of the South Carolina Code of Laws, may allow Contractor sole control of the defense, so long as the defense is diligently and capably prosecuted. State may participate in the defense of any action. Contractor's obligations under this clause shall survive the termination, cancellation, rejection, or expiration of this Agreement. "IP rights" means any rights protected by the laws governing patents, copyrights, trademarks, trade secrets, or any other proprietary rights. As used in this paragraph, "Indemnitees" means the State (including its instrumentalities, agencies, departments, boards, and political subdivisions), the contractor, the subcontractors at all tiers, and the officers, agents and employees of all the forgoing.

15.24 *Reserved*

15.25 OPEN TRADE (JUN 2015): During the contract term, including any renewals or extensions, Contractor will not engage in the boycott of a person or an entity based in or doing business with a jurisdiction with whom South Carolina can enjoy open trade, as defined in SC Code Section 11-35-5300. [07-7A053-1]